

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Review of the Commission's)
Broadcast and Cable)
Equal Employment Opportunity)
Rules and Policies)
)
)

MM Docket No. 98-204

Comments of the National Association of Broadcasters

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EXECUTIVE SUMMARY

The National Association of Broadcasters (“NAB”) proposes the adoption of the EEO Outreach rule as described in these comments. NAB always has supported the concept of diversity in the broadcasting industry. Our commitment is shown through our EEO proposal that will result in meaningful and effective outreach to all qualified individuals who are interested in a career in the broadcasting industry. NAB believes our proposed rule is the best option in light of the decision in *Lutheran Church v. FCC*, that severely limits the Commission’s ability to promulgate EEO rules as proposed in its *Notice*.

NAB supports the retention of a general anti-discrimination rule for all broadcasters that prohibits discrimination based on race, color, religion, national origin, or sex. However, the FCC should defer to the Equal Employment Opportunity Commission (“EEOC”) for a final determination on any discrimination allegations.

NAB proposes several ways that broadcasters can provide employment information to a broad range of applicants. These options will result in meaningful outreach without the undue recordkeeping burdens of former – and proposed – rules. The FCC’s proposed rules would maintain a system where stations are required to focus on retention of paper instead of effectively recruiting for job vacancies. The realities of recruiting in the broadcasting industry demand a flexible requirement that provides discretion to the stations. Our proposed rule will provide the flexibility while still achieving the goal of the Commission.

In order to comply with NAB’s proposed rule, stations with five (5) or more full-time employees must certify every two years that they have either: (1) complied with the Office of Federal Contract Compliance Program (“OFCCP”) EEO regulations as a covered federal contractor; *or* (2) complied with their state broadcaster association’s “Broadcast Careers” program; *or* (3) complied with the NAB’s General and/or Specific Outreach Initiatives of the station’s choosing.

NAB believes that compliance with any of these three options will provide the requisite EEO outreach. First, if a station is in compliance with OFCCP regulations, it should not have the additional burden of complying with FCC regulations. Additionally, the Broadcast Career program currently being established by numerous state associations will also provide meaningful assistance and outlets for stations and the public, primarily through the use of the Internet. Finally, the NAB Outreach Initiatives are available for stations that are not federal contractors or participants in their state association program.

In order for a station to be in compliance with the outreach initiatives, it must certify that it has provided outreach through at least two (2) General Initiatives, *or* at least one (1) General and at least two (2) Specific Initiatives, *or* at least four (4) Specific Initiatives. The station would be able to pick and choose which initiatives would work best for its own specific situation and resources. The General Initiatives include: (1) Sponsoring a job fair; (2) Regular attendance at job fairs; (3) Offering scholarships; (4) Establishing a mentoring program; (5) Establishing a training program; or (6) Establishing an internship program.

The Specific Initiatives include: (1) Regularly posting job openings on web pages; (2) Regularly placing advertisements in publications; (3) Regularly announcing job openings on the air; (4) Regularly posting job vacancies at the station and/or utilizing current employees for recruiting qualified applicants; (5) Regularly contacting organizations with job vacancy information; (6) Hosting a “broadcast career night”; (7) Having station personnel speak at schools; (8) Participation in organized internship programs; or (9) Other outreach efforts that regularly provide job vacancy information to a wide variety of individuals. The NAB proposed rule clearly defines what is expected of broadcasters and will allow station personnel to actively focus on outreach.

NAB proposes to require stations certify compliance every two years and to maintain documentation that proves they have properly certified their efforts. The documentation will be

available to the Commission, if necessary. However, only the certification will be retained in the public file. Stations would not maintain any records regarding the race and/or gender of any applicant for any job vacancy.

NAB believes that compliance with our proposed rule will achieve the outreach goals without the need for any self-assessment that requires monitoring the race and gender of applicants. The Commission will have the authority to conduct random audits to verify compliance. Also, stations would not be required to file the Annual Employment Report with the FCC.

NAB believes our rule should be adopted because the proposals by the Commission threaten to overstep established constitutional boundaries. First, the Commission is relying on conclusions that a nexus exists between minority and female employment and the Commission's mandates to increase minority and female ownership and to increase diversity in programming. The Commission does not offer any evidence to prove these conclusions. Without these vital links, the Commission cannot establish a governmental interest in promulgating EEO rules.

Even if the Commission can establish a nexus, under court precedent, the government interest will not withstand judicial scrutiny. All racial classifications must survive strict scrutiny – the Government must establish a compelling interest that is furthered by narrowly tailored means. The Commission's proposed rules are suspect under this test because requiring the use of minority and female recruiting sources and "self-assessing" the results impose improper pressures to hire minorities and females. Further, filing an Annual Employment Report also imposes an incentive to hire based on race or sex because there is no guarantee that the information will not be used against a station if the numbers look "low." NAB believes the Commission's proposal fails the established constitutional test because it has not established a compelling governmental interest and the proposed regulations are not narrowly tailored.

Further, NAB believes the Commission should not adopt the proposed “mid-term” review for TV broadcasters. Congress intended a limited review, and Congress would be the appropriate entity to determine what is required.

Additionally, the Commission should consider whether the EEO rules should be applied only to larger stations, especially if it would adopt the extensive recruiting and recordkeeping requirements proposed in its *Notice*. Finally, the Commission must establish a specific goal that it wishes to achieve through EEO regulations. Once that goal is achieved, then the EEO rules should sunset.

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Comments of the National Association of Broadcasters

I. INTRODUCTION

The National Association of Broadcasters ("NAB")¹ submits its comments in response to the above-captioned *Notice of Proposed Rule Making* ("Notice").² The Commission proposes to reinstate many of its former EEO rules despite the Court of Appeals for the D.C. Circuit's opinion in *Lutheran Church-Missouri Synod v. FCC*.³ In light of the *Lutheran Church* decision, NAB proposes the adoption of an EEO Outreach rule as described in these comments.

NAB's proposed rule is designed to provide meaningful outreach to a broad range of individuals regarding job vacancy information in the broadcasting industry. The rule gives broadcasters the discretion to tailor their EEO outreach to fit the needs and abilities of their station without imposing burdensome recordkeeping and reporting requirements. At the same

¹ NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

² *Notice of Proposed Rule Making* in MM Docket No. 98-204, ___ FCC Rcd ___ (1998).

³ *Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *reh'g denied*, 154 F. 3d 487 (D.C. Cir. 1998). [hereinafter "*Lutheran Church*"]

time, NAB's proposed rule meets the goal of the Commission to provide employment information to a wide variety of applicants, including minorities and females.

NAB questions the FCC's constitutional authority to prescribe the EEO rules that its proposes in its *Notice*. In order to adopt the broad, mandatory recruitment requirements proposed in the *Notice*, it must be able to show that there is a compelling governmental interest that is furthered by narrowly tailored regulations. The Commission's interest is neither compelling (as established by prior court decisions), nor are the measures narrowly tailored because its *Notice* still proposes: (1) to require recruitment that focuses on minorities and women for every job vacancy, (2) to maintain detailed race and gender records on applicants and (3) to "self-assess" the results of the recruitment based on the records maintained. Stations would also be required to file the Annual Employment Report so the Commission may monitor trends in the industry. There is serious doubt whether the FCC proposals could pass muster under the Constitution and they certainly are burdensome for broadcasters.

II. NAB'S COMMITMENT TO DIVERSITY

NAB has always supported the concept of diversity in the broadcasting industry. NAB's Human Resource Development Department has been a valuable vehicle that provides assistance to broadcasters in recruiting for job vacancies through the NAB Career Center. The Career Center is designed to meet the goals of promoting non-discrimination, as well as diversity, in the broadcasting industry, providing up-to-date information on all job openings at member stations and provide additional recruitment outreach services. Specifically, the Career Center provides a clearinghouse on the Internet where broadcasters can provide job vacancy information and interested applicants can post and submit their resumes for free.⁴

⁴ Copies of the NAB Broadcast Career Center web pages are included as Appendix A.

Individuals can search for current job openings anywhere in the country, post a resume or obtain additional employment information simply by logging on to NAB's web page and entering the Career Center site. Similarly, NAB member stations can use the Career Center site to post their job openings and search the resume database. The Career Center also features a job line that lists job vacancies. The job line is available 24 hours a day, and on holidays. The Career Center web page also links to all of the state association web pages as part of the "Broadcast Career Programs" sponsored by participating state associations.

Hundreds of resumes are currently on file with the Career Center, either electronically or in paper form. Additionally, the Career Center offers counseling for prospective broadcast employees and current station employees seeking assistance in career planning. Broadcasters may also call for personalized service in finding job candidates. Over the last 20 years, the NAB Career Center has helped place over 1000 broadcast job applicants.

The NAB Human Resource Development Department also conducts other outreach initiatives. For the past several years, the Department has conducted a major broadcast career fair in cooperation with the Broadcast Education Association during the annual NAB convention in Las Vegas. In 1998, many exhibitors, including state associations, radio and television stations and groups, promoted job opportunities to hundreds of students and professionals from across the nation. The Department also conducts similar job fairs in conjunction with the NAB's annual Radio Show. The Department also has assisted in regional broadcasting career fairs with state broadcasting associations. In fact, NAB staff played an integral role in the development of the state association Model Broadcast Career Program that is discussed as part of our proposed rule.

The NAB Education Foundation (“NABEF”) is another NAB entity that focuses on promoting diversity in the broadcasting industry.⁵ NABEF offers fellowships for students to gain experience in the broadcasting industry. Fellowships are also available for professional managers to attend NAB’s management programs. Additionally, NABEF is planning to create a mentoring program for top-level executives who are women, minorities or other underrepresented groups. The program will consist of seminars that are designed to provide information regarding leading and acquiring broadcast properties.

Additionally, NAB President Edward O. Fritts has announced that he will propose to NAB’s Board of Directors that it invest up to \$10 million dollars in an industry-backed investment fund designed help minorities buy TV and radio stations.⁶ The Chief Executives of CBS and Clear Channel Communications have begun organizing the fund, and around 50 major radio-TV groups have been asked to help launch it.⁷ NAB’s proposal shows our commitment to increasing diversity in the industry.

NAB also shows our support for diversity in the industry through our efforts to design and propose in these comments, a detailed EEO rule that has been approved by our Board of Directors after extended discussion and review. From the day that the court found the FCC’s EEO rules unconstitutional, NAB has been on the record recognizing that increased diversity has greatly strengthened broadcasting’s commitment to local service. NAB remains committed to diversity, and supports the EEO Outreach rule described below.

⁵ Additional details regarding NABEF’s initiatives are found at Appendix B.

⁶ See Statement of NAB President & CEO Edward O. Fritts on Broadcast Minority Ownership Fund, February 18, 1999.

⁷ See “NAB offers \$10M for minority plan,” *Broadcasting & Cable*, February 22, 1999, at 14.

III. NAB'S PROPOSED BROADCAST EEO RULE

A. Anti-discrimination Rule

NAB supports the retention of a general anti-discrimination rule for all broadcasters. Such a rule merely states the law that is applicable to all employers. This anti-discrimination rule would apply to all commercial and noncommercial AM, FM, TV or international broadcast stations. It states that stations shall provide equal opportunity to all qualified persons and shall not discriminate based on race, color, religion, national origin, or sex.

However, NAB believes that the FCC should not consider allegations of discrimination prior to a final determination by the Equal Employment Opportunity Commission ("EEOC") or the courts. The FCC does not have the expertise to properly enforce any anti-discrimination clause. The EEOC and the courts are the appropriate enforcing entities for any complaints or allegations of discrimination.

The FCC's involvement should arise after the EEOC or the courts determine that a broadcaster has discriminated. Only then should the Commission impose an appropriate sanction.

B. The NAB EEO Outreach Initiatives

NAB proposes several ways that broadcasters can reach out to provide employment information to broad range of applicants.⁸ NAB believes that our rule casts a wide enough net so that the Commission can be assured that meaningful outreach will occur. The NAB rule allows broadcasters to choose what outreach would work best for their station without the undue burdens of the former – and proposed – rules.

⁸ The text of NAB's proposed EEO rule is attached as Appendix C.

NAB stresses that the Commission must consider the impact its former EEO rules had on the broadcasting industry, and ultimately on the quality of the outreach. The NAB proposed initiatives would allow broadcasters to take a more active role in outreach by developing a personalized outreach program. Under the former EEO rules, stations were forced to merely “go through the motions” where document retention was the ultimate result. Resources can be used in more efficient ways, which should, in turn, result in better outreach.

NAB pointed out the counterproductive nature of the FCC’s version of recruitment and outreach in the *EEO Streamlining* proceeding.⁹ In the past, stations were forced to delay hiring decisions in order to follow the proper procedure of contacting recruitment sources, gathering an “adequate” pool of applicants and then making the hiring decision. This type of system wastes a station’s resources because, in many instances, the station needs to hire someone quickly, but risks losing a qualified applicant due to the necessity of following procedure.¹⁰

Adding to the burden of the procedure was the recordkeeping requirement. Before a station can even maintain and analyze these records, it must first obtain the information. It is a burden to spend the resources to collect the information concerning the race and gender of applicants when it is voluntary on the part of the applicants. Incomplete data results in incomplete assessment and incomplete assessment leads to fines and forfeitures. The Commission’s former – and proposed – rules continue to thwart the achievement of the ultimate goal which is to provide all qualified applicants with the necessary information regarding careers and current employment opportunities in the industry.

⁹ See Comments of NAB, MM Docket No. 96-16, filed July 11, 1996, at 11.

¹⁰ See *id.* at 12.

Stations should be able to focus on active recruitment of qualified applicants. If the Commission wants meaningful outreach, it must adopt rules that further that goal. The options proposed by NAB do just that.

The NAB rule proposes three ways for broadcasters to provide EEO outreach. Stations with five (5) or more full-time employees would be required to certify either: (1) compliance with the Office of Federal Contract Compliance Program (“OFCCP”) EEO regulations as a federal contractor; or (2) compliance with their state broadcaster association’s “Broadcast Careers” program¹¹; or (3) compliance with the NAB’s General and/or Specific Outreach Initiatives of the station’s choosing.¹² NAB believes compliance with any one of these options would provide the requisite EEO outreach.

1. OFCCP EEO Regulations

The OFCCP administers detailed anti-discrimination and affirmative action regulations for all covered federal contractors. Under OFCCP regulations, *all* federal contractors are prohibited from engaging in employment discrimination on the basis of race, sex, religion or national origin.¹³ Certain covered contractors must engage in affirmative action efforts for minorities and women.¹⁴ Additionally, covered contractors must engage in affirmative action

¹¹ The standards for compliance with a state association “Broadcast Career Program” are defined in the Joint Comments of the Named State Broadcasters Associations, MM Docket 98-204, filed March 1, 1999.

¹² See Section IV.B.2.e., *infra* page 29, regarding further streamlining for smaller broadcasters if the Commission adopts EEO rules that impose significant recordkeeping burdens.

¹³ See 41 C.F.R. § 60-1.4 (1998).

¹⁴ See 41 C.F.R. § 60-2.1 – 2.32.

efforts to employ qualified special disabled veterans and Vietnam veterans,¹⁵ as well as individuals with disabilities.¹⁶

The dollar amount of the federal contract dictates the extent of the affirmative action requirements. For example, contractors above \$10,000 are covered by the anti-discrimination clause and are required to provide affirmative action; however, the regulations do not define the exact nature of the affirmative action program.¹⁷ Contractors with over 50 employees and with contracts above \$50,000 must have a written affirmative action program for minorities, women, Vietnam veterans and persons with disabilities.¹⁸ These affirmative action program requirements vary depending on the applicable Executive Order or statute. However, the requirements are extensive. For example, some of the basic contents of a written affirmative action program under Executive Order 11246 include appointment of EEO officers, conducting a utilization analysis,¹⁹ identifying goals and many other components.²⁰

¹⁵ See Affirmative Action Obligations of Contractors and Subcontractors for Disabled Veterans and Veterans of the Vietnam Era, 41 C.F.R. § 60-250 *et seq.* (1998).

¹⁶ See Affirmative Action and Non-Discrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 41 C.F.R. § 60-741 *et seq.* (1998).

¹⁷ See 41 C.F.R. §§ 60-1.4, 60-250.1 and 60-741.1.

¹⁸ See 41 C.F.R. §§ 60-2.1, 60-250.5 and 60-741.40.

¹⁹ A utilization analysis consists of four components: (1) Workforce analysis; (2) Identification of job groups; (3) Availability analysis; and (4) Underutilization analysis. 41 C.F.R. § 60-2.11 (1998).

²⁰ See 41 C.F.R. §§ 60-2.12 and 60-2.13.

These regulations go far beyond any prior – or proposed – FCC-mandated EEO regulations.²¹ Broadcast stations that are covered federal contractors should not be given the additional burden of compliance with both FCC and OFCCP regulations because the OFCCP requirements alone achieve all of the FCC’s objectives. Thus, under NAB’s proposed EEO outreach rule, broadcasters can meet the FCC EEO requirements if they certify that they are in compliance with the OFCCP regulations as a covered federal contractor.

2. State Association “Broadcast Careers Program”

The Broadcast Executive Directors Association (“BEDA”) has developed a Model “Broadcast Careers Program” for state broadcasting associations.²² The BEDA model program is designed to promote non-discrimination in the broadcasting industry, to maximize outreach to all qualified applicants for job vacancies and to expand educational opportunities helpful to a career in broadcasting. State broadcasting associations have been encouraged to adopt and implement the “Broadcast Careers Program” for the benefit of the state association and individual broadcast station participants.

The model program suggests several “highways” that provide examples on ways state associations and stations can reach the goals of the program. Specific examples include the offering of scholarships, mentoring programs and training programs by the state association and assisting stations in their recruitment outreach efforts by providing information on referral sources and sponsoring job fairs.

²¹ Although NAB includes compliance with OFCCP regulations as part of our proposed EEO Outreach rule, we do not accept any conclusion that these regulations are constitutional. If OFCCP regulations were also found unconstitutional, that option under NAB’s EEO rule would disappear, and the rest of the rule would remain intact.

²² See Joint Comments of the Named State Broadcasters Association, MM Docket 98-204, filed March 1, 1999.

The highlight of the program is that BEDA and many participating state associations will maintain a World Wide Web site that links to all of the other state associations. Participating stations will be able to post job vacancies on BEDA's web page and/or their state association's web page. Members of the public will be able to post their resumes to the web page.

The model program also describes numerous ways that the state association will promote the program to ensure that the general public, as well as the broadcasting industry at large, is aware of its existence and its benefits. At least 45 state associations have adopted the program and more have it under active consideration.

The "Broadcast Careers Program" is a good example of how joint efforts can best maximize outreach efforts. Stations can benefit from the resources provided by BEDA and their state associations. Additionally, members of the public will have access to the information – and the ability to directly apply for current openings – over the Internet. The Internet has proven to be one of the most effective ways for information dissemination. In fact, the FCC has recognized the Internet's usefulness by instituting proceedings that have resulted in the electronic comment filing system, mandatory electronic filing of applications for broadcasters and mandatory electronic reservation of call signs. The Commission knows the efficiencies that can be realized and should recognize that one of the most effective ways for broadcasters to provide outreach would be through the use of the Internet.

The Broadcast Careers Program provides participating stations with this opportunity, plus many more ways to provide outreach in the form of scholarships, internships and mentoring programs. NAB believes the FCC's EEO outreach goals are met by a station that participates in its state broadcasting association's broadcast career program. By encouraging stations to participate in these programs, the FCC would enhance their value, both to applicants and to

stations. If, as NAB hopes, these state programs become the typical means by which stations recruit, the Commission will have achieved its goal of ensuring outreach without any of the burdens that would be imposed on stations or the FCC by the proposal in the *Notice*.

3. NAB Outreach Initiatives

If a station is neither a covered federal contractor nor a participant in a state association broadcast career program, it may fulfill its FCC EEO requirement by certifying that it has complied with the Outreach Initiatives. Stations would certify that they either have complied with: (a) at least two (2) of the General Outreach Initiatives; or (b) with at least one (1) of the General Outreach Initiatives and at least two (2) of the Specific Outreach Initiatives, or (c) at least four (4) of the Specific Outreach Initiatives.

NAB divided our Outreach Initiatives into two separate groups – General and Specific Initiatives. We believe that the General Outreach Initiatives should be given more weight in determining compliance due to the nature of the effort. The General Outreach Initiatives are: (1) Sponsor a job fair; (2) Regular attendance at local, statewide or national job fairs; (3) Offer scholarships to high school and college students interested in a broadcasting career; (4) Establish a mentoring program between students and station personnel; (5) Establish training programs for current employees; (6) Establish an internship program for students interested in a broadcasting career.

These initiatives are designed to provide an overall broad outreach, instead of focusing on the outreach for one or two specific job openings. One of the aspects of an outreach program should focus on providing general information and other opportunities within the industry in addition to getting the information out about specific job openings. For example, if a station were to establish an internship program for local college students, the station would be opening its doors to provide valuable and quality experience for students who want to start a career in

broadcasting. Additionally, training programs can be a useful tool because station employees can benefit from the training that will promote career advancement in broadcasting. The very nature of job fairs promotes outreach to many people in a format that allows for stations to have direct contact with potential applicants. All of the General Outreach Initiatives require stations to take an active role in outreach, and stations that choose to spend the additional resources on these initiatives should be given credit.

In order to provide the greatest amount of choice to stations, NAB also proposes a list of Specific Outreach Initiatives for stations to use. Many of the Specific Outreach Initiatives are those that are traditionally used when stations have specific job openings. The Specific Outreach Initiatives are: (1) Regularly post job openings on a variety of webpages; (2) Regularly place advertisements in magazines and/or newspapers; (3) Regularly announce job openings on the air; (4) Regularly post job vacancies at the station and/or utilize current employees to recruit qualified applicants; (5) Regularly contact minority and female organizations with job vacancy information; (6) Host a “broadcast career night”; (7) Have station personnel speak at schools regarding careers in broadcasting; (8) Participate in the Emma Bowen Foundation for Minority Interests in Media” internship program or other similar organized industry-wide efforts designed to train minority students for media careers; (9) Other outreach efforts that regularly provide job vacancy information to a wide variety of individuals (including minorities and women).

These initiatives tend to be more narrowly focused in that they generally contribute to EEO Outreach on a job-by-job basis. As with the state association “Broadcast Careers Program,” NAB supports the use of the Internet because of its potential for outreach. Stations can provide detailed information regarding job vacancies that is available at the click of a button

by posting the information on its own web page, the NAB's website, other broadcast industry organization web pages.

NAB also suggests that the FCC take an active role in promoting outreach to those interested in the broadcasting industry by establishing its own web page where the public can find information regarding opportunities in broadcasting. The Commission also could provide links to state association web pages and to NAB's Career Center web page to facilitate the dissemination of information.

Stations should also have the option of providing outreach through other means. For example, stations can provide outreach by placing advertisements in newspapers or magazines, by contacting industry sources for referrals, broadcasting the job openings or even hosting a "broadcast career night" where stations can invite the public to hear and learn about the station and opportunities for employment. Any of these Specific Outreach Initiatives have the potential to reach a broad range of applicants or interested people. If stations choose to use the Specific Outreach Initiatives, the requirement that a greater number be used ensures that the outreach efforts will reach a broad audience.

NAB's proposed rule would allow stations to choose to provide EEO outreach that best suits the needs and resources of the individual station, either through the OFCCP regulations, participation in a state broadcaster association program or the Outreach Initiatives. This flexibility is necessary because it will allow stations to maximize their outreach resources. It provides more certainty to stations regarding compliance with the EEO rules. Additionally, station personnel may become more involved in the outreach process instead of spending large amounts of time sending out recruitment cards and letters to sources that may not be helpful in providing qualified applicants. The NAB proposed rule clearly defines what is expected of

broadcasters in their outreach, but provides more creativity in the process. The NAB's approach should lead to better, more meaningful outreach.

C. Certification of EEO Outreach Efforts

NAB proposes to require that stations certify compliance with the EEO rules every two years, on the anniversary of the date its license renewal application must be filed.²³ Stations will retain the supplemental documentation necessary to prove they have properly certified their activities. Documentation could include copies of advertisements sent out to publications and/or posted on webpages, letters and/or documents showing attendance at job fairs, or any other documents available. This documentation would be available to the Commission, if asked to provide it. However, stations would not be required to maintain any documentation – other than the certification – in the public file. Stations would retain the supplemental documentation for one year after they have filed the biennial certification of efforts, in case of FCC audit.²⁴ Finally, stations would not be required to maintain – at any time – any records regarding the race and/or gender of any applicant for any job vacancy.

NAB believes this certification process will provide the Commission with the proper notification of a station's EEO outreach efforts without the unnecessary recordkeeping burdens of prior – and currently proposed – rules. The NAB proposed rule is designed so that compliance with the rule will achieve the outreach goals without any self-assessment. The information regarding job vacancies and general information regarding careers in broadcasting

²³ Stations would file their Ownership Report (Form 323) and the EEO Certification on the same date. The EEO certification likely would be a one page form that contains a “checklist” of the options for EEO compliance.

²⁴ For example, if a station were to file its certification on February 1, 2001, stating it was in compliance with the EEO rules for the years 1999 and 2000, the documentation for the 1999-2000 compliance period would be retained until February 1, 2002.

will be readily available to a wide variety of interested individuals – including minorities and females – through compliance with the EEO Outreach Initiatives proposed by NAB. Proving compliance is enough to show that the outreach has been achieved. It is the providing of information which is key to an outreach program.

D. Enforcement

The Commission may conduct random audits to verify compliance with the EEO Outreach rules. The Commission would request that the station prove it has properly certified it has complied with the EEO outreach rule. As in the past, the Commission may impose appropriate sanctions if a station, through an audit, is found not in compliance or has falsely certified its efforts. No additional, independent review of a station's EEO outreach will be conducted at license renewal.²⁵

The Commission, of course, may consider any final determinations of discrimination by either the EEOC or the courts or any findings of non-compliance with the EEO rules during the prior license term. The public still would have the opportunity to file a petition to deny the renewal application. However, if the petition to deny sets forth allegations of discrimination, the Commission should defer to the EEOC for a final determination on the merits. As Commissioner Furchtgott-Roth has suggested, the determination of discrimination should be left up to the entities "best equipped to make that finding, the courts and the Equal Employment Opportunity Commission."²⁶

²⁵ Thus, under the NAB's proposed rule, stations would not be required to file Form 396 with their license renewal applications.

²⁶ Statement of Commissioner Harold Furchtgott-Roth, *Memorandum Opinion and Order & Notices of Apparent Liability In re Application of Radio Sun Group of Texas, Inc. For Renewal of Licenses*, 1998 FCC Lexis 3716, July 23, 1998 at fn. 5.

E. Reporting

Under the NAB proposed EEO rule, stations would not be required to file an Annual Employment Report (Form 395-B) with the FCC. Stations with 100 or more employees still are required to file the EEO-1 Report annually with the EEOC pursuant to EEOC regulations.²⁷

As discussed below, NAB believes that the collection and reporting of the race and gender of current employees will indirectly impose an incentive to hire minorities and females and possibly subject stations to unwarranted allegations of discrimination. The Commission has not provided any guarantee that the information contained in an Annual Employment Report will not be used against a station, even if the Commission claims it will only be used to monitor trends. Indeed, it is almost inevitable that station-specific hiring data would be used to support a claim that a station's recruitment or self-assessment had been inadequate. Thus, it is inappropriate for the Commission to require the reporting of such data.

IV. CONSTITUTIONAL RESTRICTIONS ON FORMULATION OF EEO REGULATIONS

NAB believes our proposed EEO Outreach rule is the best option because it meets the Commission's goal of providing equal opportunity to all qualified applicants through the outreach initiatives. The broadcasting industry has come a long way in providing equal opportunity since the first EEO rules were established. NAB believes our plan achieves the goals of the Commission, whereas the rules proposed by the Commission threaten to overstep established Constitutional boundaries.

In a nutshell, the Commission attempts to establish a link to any statutory authority that might allow it to promulgate EEO rules. It then determines that simply removing the

²⁷ See 29 C.F.R. § 1602.7 (1998).

“processing guidelines” and the practice of comparing station results to those guidelines brings its EEO rules into compliance with the relevant Constitutional standards. The Commission’s conclusions regarding its governmental interests are not supported and that the rules proposed in the *Notice* go beyond what is allowed under the Constitution.

A. The Commission Relies On Tenuous Links to Establish Its Statutory Authority and Governmental Interest in Promulgating EEO Rules.

The Commission attempts to establish its authority to promulgate the proposed EEO rules through several statutes that it believes provides the proper congressional mandate and governmental interest. While congressional interest may be evident, the Commission relies on conclusions based on tenuous connections to the specific statutes – namely that minority and female employment will foster minority and female ownership and promote diversity of programming – to establish the governmental interest in requiring EEO rules for broadcasters.

1. Section 309(j) Authority

The Commission sets forth its conclusion that it has the proper statutory authority to establish EEO rules because its mandate under Section 309(j) of the Communications Act requires it to implement competitive bidding requirements that, among other things, disseminates licenses “among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women”²⁸ Thus, “the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services would be furthered by non-discrimination and recruitment requirements, which are designed to foster equal employment of minorities and women in the broadcast

²⁸ *Notice* at ¶ 36 (citing 47 U.S.C. § 309(j)(3)).

industry.”²⁹ The Commission believes that the work experience will provide the skills necessary to acquire and run a broadcast station.³⁰ However, the Commission specifically asks commenters for the evidence to establish the nexus to provide the necessary support for its conclusion.³¹

NAB questions whether such a link exists between employment of minorities and women and ownership opportunities.³² The Commission cites to other proceedings where it has concluded that employment will lead to ownership opportunities.³³ However, simply stating a conclusion does not necessarily make it true. The mere fact that the Commission is seeking the evidence to prove the existence of a nexus may itself show that a link may not exist.

The FCC has enforced EEO rules for nearly 30 years. During that time, it has required stations to file employment data on the Annual Employment Report. The Commission has published reports detailing the makeup of the industry from year to year. In that time, the Commission has never produced any report that would show that employment of minorities and women will lead to increased opportunities for ownership when it is relying on that link.

²⁹ *Id.* at ¶ 37.

³⁰ *See id.*

³¹ *See id.* at ¶ 38.

³² Additionally, the Commission is relying on a link between employment in broadcasting and an auction statute that will not apply to most broadcast stations.

³³ *See Notice* at ¶ 38. (citing *Report* in MM Docket No. 94-34, 9 FCC Rcd 6276, 6319 (1994) and *Third Report and Order in Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7988, 8097 (1994)).

2. Public Interest Mandate

The Commission also purports to have the statutory authority to establish new EEO rules under its public interest mandate to promote programming diversity. While this broad mandate has been interpreted to include the governmental interest in the promotion of programming diversity,³⁴ as the *Lutheran Church* court noted, the establishment of this government interest may not be enough sustain the implementation of the proposed EEO rules.³⁵

In its *Notice*, the Commission again concludes that the proposed EEO program will promote diverse programming – “programming that reflects the interests of minorities and women in the local community, as well as those of the community at large.”³⁶ However, the Commission then admits that it has never assumed that minority and female employment will always result in minority and female-oriented programming or that all minorities or all women share in the same viewpoints.³⁷ Yet, the Commission believes that programming may be influenced by all positions at a station – even those lower level positions that have no direct connection to programming.³⁸

The Commission, again, rests its authority on a conclusion that is unproven – that diversity in programming will result from employment of minorities and women. It seeks the evidence to prove a nexus between minority and female employment and diverse

³⁴ See *Notice* at ¶ 42.

³⁵ See *Lutheran Church*, 141 F. 3d at 354.

³⁶ *Notice* at ¶ 41.

³⁷ See *id.*

³⁸ See *id.* at ¶ 44.

programming.³⁹ Again, NAB questions the Commission's conclusion considering it has failed in the past to prove that such a nexus exists. Also, pursuing this governmental interest leads the Commission down a troublesome path.

In *Lamprecht v. FCC*, the Commission's female ownership preference policy was found unconstitutional because the FCC failed to show a nexus between female ownership and an increase in diversity of programming. The court applied the intermediate scrutiny standard established in *Metro Broadcasting* that requires the sex-based generalization must "advance 'substantially' the legitimating governmental interest."⁴⁰

First, the court "assumed" that there was a type of programming that could be defined as "women's programming" and that all the types of programming women put on the air are underrepresented.⁴¹ However, when it came to establishing that the Commission's policy in preferring women applicants resulted in an increase in the diversity of programming, the Commission failed in its burden. The court found no "statistically meaningful link between ownership by women and programming of any particular kind."⁴² Without this vital link, the proposed notion that equal employment opportunities for women (and even minorities) could not be sustained based on the theory that it would lead to programming diversity.

In its *Notice*, the Commission notes that it was able to establish a link between minority ownership and diversity of programming in *Metro Broadcasting*.⁴³ However, as the court in

³⁹ See *Notice* at ¶ 45.

⁴⁰ *Lamprecht v. FCC*, 958 F. 2d 382, 393 (D.C. Cir. 1992).

⁴¹ *Id.* at 395.

⁴² *Id.* at 398.

⁴³ See *Notice* at ¶ 43. However, the Commission fails to recognize that the link established in *Metro Broadcasting* likely would not withstand the increased scrutiny that must be applied.

Lutheran Church recognized, the promotion of diversity appears to be different when it becomes a link between employment and diversity of programming. The Commission depended on an “inter-station” diversity rationale in *Metro Broadcasting* where licenses are awarded to promote diversity in viewpoints; however, the FCC’s EEO rules seek “intrastation” diversity.⁴⁴ The court stated that the “intrastation” diversity goal “of making a single station all things to all people makes no sense”⁴⁵ in the realities of the radio market where stations are programmed using a particular format. Additionally, the court pointed out that the “sort of diversity at stake in this case has even less force than the ‘important’ interest at stake in *Metro Broadcasting*.”⁴⁶ In fact, it is this type of distinction that may be viewed as an improper governmental interest.

The *Lutheran Church* court accepted the Commission’s assertion of promoting diversity in programming as the governmental interest in establishing EEO rules.⁴⁷ However, the court noted that although the Commission asserts its EEO rules based on its desire to foster diverse programming – it never defines what it means by diverse programming.⁴⁸ The court went on to suggest that the Commission’s interest could be viewed as encouraging racially based views. It stated, “we do not mean to suggest that race has no correlation with a person’s tastes or opinions.

⁴⁴ *Lutheran Church*, 141 F. 3d at 355.

⁴⁵ *Id.* at 356.

⁴⁶ *Id.* at 355.

⁴⁷ *See id.* at 354. Indeed, given the Supreme Court’s decision in *NAACP v. FPC*, 425 U.S. 662 (1976), that is the only interest that would support EEO rules.

⁴⁸ *See Lutheran Church* at 354. (“The Commission never defines exactly what it means by ‘diverse programming.’ (Any real content-based definition of the term may well give rise to enormous tensions with the First Amendment).”(citations omitted).

We doubt, however, that the Constitution permits the government to take account of racially based differences, much less encourage them.”⁴⁹

Notwithstanding the lack of a definition and potential improper implications, it is clear the Commission is walking a fine line when it seeks to establish EEO rules based on a public interest mandate to promote diverse programming without any evidence to prove its conclusion that a nexus exists. It relies on a governmental interest that has only been established as an “important” interest with regard to promoting diversity through preferring minority ownership, as opposed to minority or female employment. Further, the court has questioned whether the governmental interest rises to the level of “important” when it seeks diversity of programming through the employment of minorities and women in the broadcasting industry.⁵⁰ Even if the Commission’s conclusions were established through evidence provided in this proceeding, the proposed rules would not survive judicial scrutiny.

⁴⁹ *Lutheran Church* at 355. See also *Metro Broadcasting*, 497 U.S. 547, 615 (1990)(O’Connor, J. dissenting)(“[T]he interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior.”); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). (Striking down a University of Texas Law School practice that set a lower standard of admission for blacks and Mexican-Americans as a means of promoting diversity of viewpoints because the use of viewpoint diversity as a catalyst for preferential treatment based on race may often proliferate the stereotypes that diversity is meant to eliminate).

⁵⁰ See *Lutheran Church* at 355.

B. Any Proposed EEO Rules Must Meet Established Constitutional Standards.

1. The Commission's Ability to Promulgate EEO Rules Is Severely Limited.

The court in *Lutheran Church* reviewed the Commission's prior EEO rules using the standard imposed by the Supreme Court in *Adarand v. Peña*.⁵¹ In *Adarand*, the Supreme Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."⁵² Thus, any racial classification must be narrowly tailored measures that further compelling governmental interests in order to be Constitutional under the Fifth Amendment Equal Protection Clause.⁵³ The *Lutheran Church* court also noted that "the Equal Protection Clause would not seem to admit a de minimis exception" even if it determined that some of the FCC's EEO rules – specifically those described as outreach efforts – had no real or immediate effect on employment.⁵⁴

In applying this standard to the FCC's EEO rules at issue in *Lutheran Church*, the court held the rules unconstitutional because the rules failed to meet this test. The court found the EEO rules required stations to consider race in their ultimate hiring decisions by pressuring stations to meet the numerical goals of the processing guidelines to avoid a government audit.⁵⁵

Further, the court determined the governmental interest of promoting diverse programming was not "compelling," and even assuming the interest as compelling, the EEO

⁵¹ 515 U.S. 200 (1995).

⁵² *Adarand* at 227.

⁵³ *Id.*

⁵⁴ *Lutheran Church* at 351.

⁵⁵ *See id.* at 352.

regulations were not narrowly tailored.⁵⁶ It stated that *Metro Broadcasting* “never suggested that low-level employees, as opposed to upper-level employees, would have any broadcast influence. Nor did the Commission introduce a single piece of evidence in this case linking low-level employees to programming content.”⁵⁷ Yet, the Commission required stations to recruit for every job opening.⁵⁸

The *Lutheran Church* court stated that the equal protection guarantee would not be implicated “if the regulations merely required stations to implement racially neutral recruiting and hiring programs.”⁵⁹ In denying rehearing en banc, the court noted that a regulation encouraging broad outreach to a particular race would not necessarily trigger strict scrutiny.⁶⁰ However, the court did not reach the question of “whether the government can encourage – or even require – an outreach program specifically targeted on minorities.”⁶¹ In the panel decision, the court did note that a regulation still would be subject to strict scrutiny where employment “decision-making” is connected to requirements that stations choose minority-specific referral

⁵⁶ See *Lutheran Church* at 355. “We do not think diversity can be elevated to the ‘compelling’ level, particularly when the Court has given every indication of wanting to cut back *Metro Broadcasting*.” *Id.* at 354. “Even assuming that the Commission’s interest were compelling, its EEO regulations are quite obviously not narrowly tailored.” *Id.* at 356.

⁵⁷ *Id.* at 356.

⁵⁸ This requirement has always been inconsistent with the Commission’s position in *King’s Garden*, where the Commission itself recognizes there is not a link between programming influence and low-level employees. See *Lutheran Church* at 356. See also, *King’s Garden, Inc.*, 38 FCC 2d 339 (1972), *aff’d sub.nom. King’s Garden v. FCC*, 498 F. 2d 51 (D.C. Cir. 1974).

⁵⁹ *Lutheran Church* at 351.

⁶⁰ See *Lutheran Church*, 154 F. 3d at 492.

⁶¹ *Id.*

sources or “conduct a formal analysis of its success in recruiting women and minorities and make decisions about its selection techniques and tests accordingly.”⁶²

Clearly, the court’s decision in *Lutheran Church* establishes the boundaries within which the Commission must work. If the proposed regulations implicate the Fifth Amendment, they must meet the strict scrutiny test.

2. The Commission’s Proposed Rules Exceed Constitutional Boundaries.

In its *Notice*, the Commission determined that the *Lutheran Church* decision did not prohibit it from developing “new outreach rules that would be constitutional even if they specifically focus on minorities, as long as those rules do not pressure broadcasters to use racial preferences in hiring.”⁶³ The Commission believes that a “recruitment policy that operates only to enhance the pool of candidates for a job opening will not subject anyone to unequal treatment on the basis of race and will not raise equal protection concerns.”⁶⁴ It notes that the Supreme Court has never addressed the question whether affirmative recruitment programs that do not result in racial preferences implicate equal protection concerns.⁶⁵

The Commission cites to other cases that support its view that recruitment policies that enhance the applicant pool will not raise equal protection concerns.⁶⁶ In fact, these cases do cite instances where courts have addressed recruitment programs. However, it does not appear that any of the programs in the cited cases impose the same recordkeeping and reporting

⁶² *Lutheran Church*, 141 F.3d at 351 (citing 47 C.F.R. § 73.2080(c)(2) and § 73.2080(c)(5) (1997)).

⁶³ *Notice* at ¶ 20.

⁶⁴ *Id.* at ¶ 21.

⁶⁵ *See id.*

⁶⁶ *See id.* at fn. 42 (citations omitted).

requirements of the race and gender of the applicants *in addition to* the “race-neutral” recruiting efforts that the FCC proposes.⁶⁷

In formulating proposed EEO rules, the Commission has simply removed the “processing guidelines” of the former rules and proposed virtually the same EEO rules. It reasoned that under *Lutheran Church*, the court found unconstitutional the examination and comparison of the station’s statistical recruiting results with the station’s minority and female population percentages, but outreach and recruitment requirements were allowable.⁶⁸ Thus, it has removed any requirement that the Commission or broadcasters must analyze the station’s employment profile with the relevant labor force data.⁶⁹ Further, it is proposed that stations still would be required to recruit for every job vacancy and maintain detailed records regarding the race and gender of every applicant.⁷⁰ The FCC proposed rules are highly suspect under the established Constitutional standards.

⁶⁷ See *e.g. Preightal v. Metropolitan Dade County*, 26 F. 3d 1545 (11th Cir. 1994)(Upholding the county’s affirmative action program for the fire department that ranked applicants according to race and gender because the county established a compelling interest to redress past discrimination and the program was narrowly tailored because it had previously considered race-neutral alternatives, such as career days and job fairs). *Preightal* is also distinguished in that the governmental interest was in fact compelling because of a history of discrimination against minorities and females. *Adarand* does allow race-based remedies for proven patterns of past discrimination. See *Adarand*, 515 U.S. at 237. However, there is no record of discrimination in the broadcasting industry.

⁶⁸ *Notice* at ¶ 20.

⁶⁹ *Id.* at ¶ 52.

⁷⁰ *Id.* at ¶¶ 61 – 69.

a. Recordkeeping Requirements

Although the Commission believes it has removed the incentive for stations to consider race in making decisions, the proposals continue to instill these improper pressures. The Commission cannot require stations to utilize a specific number of recruitment sources – including minority and female sources – and then require them to analyze the productivity of these sources to “self-assess” whether the efforts have been effective.

The “self-assessment” comes in the form of maintaining detailed records regarding the race and gender of every applicant from every recruitment source to determine if the outreach has resulted in “the broadest pool of qualified applicants.”⁷¹ If the sources do not prove to be effective, then stations are forced to find and use other minority or female sources. Upon reviewing the results of the sources, the stations still will need to compare their records with the local labor source in order to prove it has provided the outreach. This is precisely the type of recruitment program that will lead the Commission down the wrong path. If the goal of the Commission is to provide the job vacancy information to all applicants – including minorities and women – then it must adopt a *truly* race-neutral approach to outreach, or risk running afoul of the Constitution.

The NAB proposed rule provides the outreach to all qualified applicants without imposing the burdensome – and improper – recordkeeping for self-assessment purposes. The mere compliance with the NAB proposed rule will ensure the outreach without reliance on the “word-of-mouth” recruitment that the Commission seeks to abolish.

⁷¹ *Id.* at ¶¶ 61, 72 – 73.

b. Annual Employment Reports

The proposal to reinstate the filing of the Annual Employment Report also threatens to improperly force stations to consider race or gender when hiring. The Commission claims that it needs the Annual Employment Report statistics to monitor “trends” in the industry. NAB opposes reinstatement of this reporting requirement because the Commission has not guaranteed that the Commission or others will not use the collected information against an individual broadcaster in case the “numbers” look low. The information contained in the Report could be used to allege that a station is not recruiting “hard enough” or that it discriminates because it does not have the “proper” mix of employees. Clearly, this threat alone imposes an indirect pressure on stations to consider race or gender when making hiring decisions.

Additionally, the Commission’s review the “trends” to determine if any alteration of the EEO rules would be necessary in order to facilitate minority and female employment in the industry may itself pressure broadcasters to hire minorities and women. The Commission’s intent to monitor the industry to make sure the EEO outreach is, in fact, resulting in increased employment of minorities and females may step beyond the allowed action of a federal entity.

c. Mid-Term Review

The Commission also notes that while Section 334 of the Communications Act prohibits it from revising the EEO rules for TV broadcasters, it believes that it has the authority to alter the EEO rules for TV to “address the concerns raised by the court in *Lutheran Church*,” but not frustrate the intent of Congress.⁷² NAB does not question the Commission’s ability to alter the television EEO rules so that they are constitutional. However, it is clear that the Commission cannot conduct the same “mid-term” review required by the Communications Act because the

⁷² *Notice* at ¶ 35.

review focuses on comparing the employment report information with the station's labor workforce.⁷³ The Commission proposes to require television stations to submit a "narrative" statement of their EEO outreach and "self-assessment" at mid-term and again as part of their license renewal with Form 396.⁷⁴

Congress intended that the Commission conduct a limited review of television station EEO efforts at mid-term.⁷⁵ The Commission's proposal for a mid-term review flies in the face of Congressional intent because it proposes the same review at mid-term as would be conducted for license renewal. Further, Congress would be the appropriate entity to determine what is required in a mid-term review in light of the unconstitutionality of its statute.

A mid-term review would not be necessary if the Commission adopts NAB's proposed rule that requires certification every two years. The Commission would have the information regarding all broadcasters efforts submitted four times within one license term. The NAB proposed rule also provides for the Commission to audit stations to verify compliance. Under the NAB proposed rule, biennial certification combined with the ability to conduct random audits provides more than enough regulation of EEO efforts.

⁷³ See Conference Agreement, Cable Act of 1992, P.L. 102-385, 106 Stat. at 1279. See also, *Report and Order* in MM Docket No. 92-261, 8 FCC Rcd 5389 (1993).

⁷⁴ Notice at ¶ 76.

⁷⁵ See Conference Agreement, *supra* note 68, at 1279.

d. Streamlining For Smaller Stations

The Commission proposed in 1996 to reduce the burden of EEO enforcement on smaller stations by increasing the number of full-time employees that trigger EEO requirements.⁷⁶ In the *Notice*, the Commission asks whether it should adopt that proposal.⁷⁷ While the NAB outreach proposal would apply to stations with five or more full-time employees, the Commission may well wish to consider whether its EEO enforcement resources would be more efficiently used by applying the rule only to larger stations which have more staff turnover and can afford to have personnel devoted to recruitment. Certainly if the Commission were to adopt the extensive recruiting and recordkeeping requirements proposed in the *Notice*, it should limit those requirements to larger stations for the reasons set forth in NAB's comment in the 1996 proceeding.⁷⁸

The Commission also asks whether its ability to set a higher number is restricted by the decision in *Office of Communication of the United Church of Christ v. FCC*.⁷⁹ Unlike that case, the FCC here is not changing an existing rule, but adopting a new one, since its previous rules were eliminated by *Lutheran Church*. When adopting new rules, the *United Church of Christ* court recognized that agencies have far broader discretion to adopt "initial cut-off or threshold criteria."⁸⁰ Further, the FCC's decision there was vacated because the Commission's *Report and Order* did not articulate the reasons for changing the rule that were later advanced by counsel.

⁷⁶ *Streamlining Broadcast EEO Rule and Policies*, 11 FCC Rcd 5154, 5164 (1996).

⁷⁷ *Notice* at ¶ 84.

⁷⁸ *See* Comments of NAB, MM Docket No. 96-16, at 20.

⁷⁹ 560 F.2d 529 (2d Cir. 1977).

⁸⁰ *Id.* at 532.

Finally, the court in *United Church of Christ* saw no reason to alter the stations subject to the EEO rules because it was “clear that elaborate programs are not expected of small stations.”⁸¹

The Commission’s proposed rule would require of small stations exactly the same elaborate recruitment, self-assessment, and recordkeeping efforts as large stations. Thus, *United Church of Christ* does not bar the Commission from adopting a higher cut-off for EEO enforcement now.

e. Sunset of EEO Rules

If the Commission determines that it is permissible for it to promulgate the proposed EEO rules, the Commission must tie the rule to a goal upon when reached, the EEO rules will sunset. As part of its decision to remand the case in *Adarand*, the Supreme Court stated that the Court of Appeals had to address the question of “whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”⁸² Assuming the Commission’s interest is compelling, it must establish a goal for any EEO rules to narrowly-tailor the regulations.

In the 30 years of EEO regulation, the Commission has never stated a specific goal it wishes to achieve through EEO regulations. Clearly, it must now establish such a goal so that any EEO rule is appropriately limited, and then sunset the EEO rules when the goal has been achieved.

⁸¹ *Id.* at 534.

⁸² *Adarand* at 238. (citing *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980)(Powell, J. concurring)).

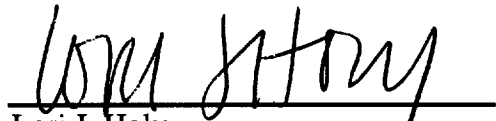
V. CONCLUSION

NAB always has supported the notion of diversity in the workplace. Throughout the past few decades, the evidence shows that the broadcasting industry has been doing a good job at increasing the number of minority and female employees in the industry. The EEO Outreach rule proposed by NAB in these comments seeks to continue that outreach consistent with the Commission's goals. The FCC's proposed rule, while having the same goal, seeks to achieve it through less effective and more burdensome means, while walking on a tightrope of Constitutionality. NAB respectfully requests that the Commission adopt an EEO Outreach rule as proposed in these comments.

Respectfully Submitted,

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March 1, 1999

APPENDIX A

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For more information about the [NAB Career Center](#), seminars, or counseling contact [Michael D. McKinley](#), Director of Broadcast Resource Programs. If you are an NAB Member and want to list a job opening just click on the Go button for "Post a Job Listing." For additional information about the Career Center call (202) 429-5497.

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Search the current list of openings in the NAB Job Bank by entering any of the criteria below:

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Posting Date

From 2/11/1999

To 3/4/1999

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Add your Resume to the NAB Employment Clearinghouse:

The information collected with this form is intended for NAB members only and will be retained in our database for 6 months. However, you are hereby notified that any information you submit could be read by an unintended recipient.

Resume of

First Middle Last

Address

City: State: Zip Code:

Daytime Phone: Home Phone:

Email:

Position Applied for:

Employment

Employer:

Job Title:

Job Begin Date: Job End Date:

Employer:

Job Title:

Job Begin Date: Job End Date:

Enter brief information on any internships served:

Internship:

Education

Institution (include Name/Location of highest level institution attended):

Years Attended: Degree Earned:

Location Preference:

City: State: Select Region:



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- **Talent Bank**-- Don Fitzpatrick's Job Listings For On-Air News Talent.
- **Television Jobs** -- TV Employment Opportunities.
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FIND YOUR IDEAL INTERNSHIP OR FELLOWSHIP

- **NAB Career Center Internship** -- The NAB Career Center internship program is designed to attract talented individuals who wish to build successful broadcasting careers. Those who are selected will have the unique opportunity to work at NAB Headquarters in Washington, DC. You'll gain the kind of experience that great careers are built on, giving you the edge in a very competitive industry. The Career Center offers internships during the fall, spring and summer sessions. **Note:** This is not a paid internship. This intership is viewed as a learning

experience. If you would like to apply or have questions, please feel free to contact the NAB Career Center.

- **RTNDA Internships/Fellowships -- Scholarship and fellowship opportunities for young professionals preparing for a career in journalism.**
- **Workshop For Journalists -- Measuring change in the coastal environment at the University of Rhode Island -- E-mail inquiries: Jack@gso.uri.edu**
- **LinTV -- Offers scholarship and training program for minority candidates.**
- **WBZ Radio & TV -- CBS owned and operated stations offers internship opportunities to college sophomores, juniors and seniors and graduate students.**

Back To Main Page

If you have any sites or other resources to recommend, send them to the **CareerCenter**. The Career Center webplace provides access to other World Wide Web (WWW) sites. However, this access does not imply endorsement or approval of those sites. Check the Uniform Resource Locator (URL) address provided in your WWW browser to determine whether you are still in the Career Center web place or have moved to another location.

APPENDIX B



Promoting Diversity on Three Levels

- **Students**

- Summer Fellowship: NABEF brings a college or university student to Washington each year to work with NAB staff and local broadcasters.
- NABEF is an active member of the Emma L. Bowen Foundation for Minority Interests in Media and hosted part of the group's "Congress '98" meeting last June. In addition, Chuck Sherman serves on the board of directors.

- **Managers**

- Professional Fellowship: NABEF provides four fellows (two from radio and two from television) to attend NAB's management programs, with an emphasis on training minorities and other groups that may be underrepresented in the industry.
- In addition, NABEF works with the Newspaper Association of America Foundation to provide two "Robert R. McCormick Tribune Foundation" fellowships to minority broadcasters.

- **Owners**

- Proposed Mentoring Program: NABEF has plans to create a unique opportunity for top-level executives who are women, minorities, or members of other groups underrepresented in the industry. Participants in this program will spend one weekend each month attending an intensive seminar at NAB headquarters. Guest speakers from the financial community, FCC, and broadcast industry will impart the knowledge and skills needed to lead and acquire broadcast properties.

APPENDIX C

NAB Proposed Broadcast EEO Rule

Part 73 of Title 47 of the U.S. Code of Federal Regulations, Section 73.2080, is proposed to be deleted in its entirety and replaced with the following:

§ 73.2080. Equal Employment Opportunity (“EEO”) Outreach

- (a) *General EEO Policy.* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex.
- (b) *EEO Outreach.* Each broadcast station with five (5) or more full-time employees shall carry out a positive outreach program designed to provide information to all qualified applicants regarding job vacancies at the station. Stations shall certify, every two years, that they have met the EEO Outreach rules through either:
 - (1) Compliance with Office of Federal Contract Compliance Program (“OFCCP”) EEO regulations; *or*
 - (2) Compliance with the station’s State Association “Broadcast Careers Program” requirements; *or*
 - (3) Compliance with the requirements in (c) and (d), below.
- (c) *Individualized EEO Outreach.* A station may choose to meet its EEO Outreach obligations through certification of a variety of outreach efforts. Stations may choose the outreach initiatives that will work best for that station’s particular circumstances. A station must certify it has complied with:
 - (1) At least two (2) of the *General Outreach Initiatives* in (d)(1); *or*
 - (2) At least one (1) of the *General Outreach Initiatives* in (d)(1) and at least two (2) of the *Specific Outreach Initiatives* in (d)(2); *or*
 - (3) At least four (4) of the *Specific Outreach Initiatives* in (d)(2).
- (d) *EEO Outreach Initiatives.*
 - (1) *General Outreach Initiatives.*
 - (i) Sponsor a job fair.
 - (ii) Regular attendance at local, statewide or national job fairs.
 - (iii) Offer scholarships to high school and/or college students who show and interest in pursuing a career in broadcasting.
 - (iv) Establish a mentoring program between students and station personnel.
 - (v) Establish an internship program for students interested in a career in broadcasting.
 - (vi) Establish a training program for current employees that furthers career advancement.

(2) *Specific Outreach Initiatives.*

- (i) Regularly post job openings on a variety of webpages (i.e. station webpage; industry association webpages; state association webpage; minority and female organization webpages; FCC webpage).
- (ii) Regularly place advertisements in magazines and/or newspapers (i.e. publications with general distribution and publications with minority and/or female distribution).
- (iii) Regularly announce job openings on the air.
- (iv) Regularly post job openings at station and/or utilize current employees to recruit qualified applicants.
- (v) Regularly contact minority and female organizations with job opening information.
- (vi) Host a "broadcast career night" where the public is invited to learn about the broadcasting industry, meet with key station personnel and is invited to fill out employment application.
- (vii) Have station personnel speak at local schools regarding careers in broadcasting.
- (viii) Participate in the Emma Bowen Foundation for Minority Interests in Media Internship Program or other similar organized industry-wide efforts designed to train minority students for media careers.
- (ix) Other outreach efforts that regularly provide job vacancy information to a wide variety of individuals (including minorities and women).

(e) *Certification of EEO Outreach Efforts.*

- (1) Stations shall certify compliance with the EEO Outreach rules every two years on the anniversary of its license renewal.
- (2) Stations shall retain documentation concerning their outreach efforts (i.e. copies of ads; printouts of webpage ads, etc.) for one year after it has filed its biennial certification of efforts. The documentation will not be retained in the public file.
- (3) Stations are not required to maintain any records regarding the race and gender of any applicant for any job vacancy.

(f) *Enforcement.* The Commission may conduct random audits to verify compliance with the EEO Outreach rules. No additional review of EEO Outreach will be conducted at license renewal. Appropriate sanctions will be imposed for violations and/or non-compliance with the rule.

(g) *Reporting.* Stations are not required to file an Annual Employment Report (Form 395-B). Stations with 100 or more employees must file the annual EEO-1 Report with the Equal Employment Opportunity Commission.